ATTORNEY FOR APPELLANT:

MICHAEL RILEY
Rensselaer, Indiana

ATTORNEY FOR APPELLEE:

WILLIAM T. SAMMONS
Law Offices of Randle & Sammons
Rensselaer, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MORRIS BARBEE,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 37A03-0510-CV-495
	)	
CHARLES STONE and	)	
KAY STONE,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE JASPER SUPERIOR COURT
The Honorable J. Philip McGraw, Judge
Cause No. 37D01-0411-PL-467

October 3, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Morris Barbee ("Barbee") brings this appeal challenging the trial court's conclusion that Charles and Kay Stone's ("the Stones") fence was appropriately placed on their own property and that they were entitled to attorney's fees because Barbee frivolously filed an action for fence removal and damages. We affirm in part and reverse in part.

Issues

Barbee presents two issues for review, which we restate as:

I. Whether the judgment for the Stones is contrary to law where three land surveys showed the Stones' fence to be on their property and two surveys showed it to be on Barbee's property; and

II. Whether the trial court properly awarded attorney fees on the basis that Barbee filed a frivolous lawsuit.

Facts and Procedural History

The Stones moved onto their parcel of land sometime during the 1970s. On August 9, 1979, Charles had a land survey ("the Dodge Survey") conducted to "establish [the Stones'] fence and get the property stakes and where it's supposed to be."[1] Tr. at 24; Def. Ex. A. The Stones put up a wire fence using markers installed during the Dodge Survey as a guide. Specifically, Charles placed stakes in the ground two or three inches from what he believed to be his property line, and he stretched a string along the line of stakes to guide the installation of the fence.

Around 1985, Barbee moved onto the parcel of land bordering the Stones' property to the south. In 1994, Barbee requested Emil Beeg to conduct a survey ("the 1994 Beeg

Survey"). The 1994 Beeg Survey identifies "Adjoiner's Fence," i.e., the Stones' fence, at the northern border of Barbee's property and shows that the fence posts are just north of existing survey markers for Barbee's property.[2] Pl. Ex. 2.

At some point, Barbee wanted to install his own fence and he quarreled with Charles about the location of the existing fence. On August 20, 2004, Barbee recorded a Notice of Disputed Property Line Encroachment, which alleged that the Stones' fence was unlawfully encroaching upon Barbee's property. On November 18, 2004, Barbee filed a complaint for removal of the fence and for damages, and he attached a copy of the 1994 Beeg Survey.

In February of 2005, subsequent to filing his complaint, Barbee had another survey ("the 2005 Beeg Survey") conducted.[3] The 2005 Beeg Survey shows that both end posts were located on the Stones' property. However, some of the line posts lie on Barbee's property.

On March 14, 2005, Barbee had an additional survey ("the Kingman Survey") conducted. The Kingman Survey provides, in relevant part:

> The purpose of this survey was to check the location of the existing fence between Mr. Morris Barbee and Mr. Charles Stone, and compare it's [sic] location with the record description of the property. To do this many things need to be considered.

---

[1] The Dodge survey was apparently conducted with reference to the deed record and by locating or setting physical markers; there is no indication that adjacent parcels or other documents were examined.

[2] The 1994 Beeg survey was limited to an examination of Barbee's property and a couple of other measurements that appear to serve the purpose of locating Barbee's parcel relative to State Road 49.

[3] The 2005 Beeg survey was conducted with reference to several prior surveys and plats: the 1994 Beeg survey; two plats of survey conducted by Richard W. Arnott in 1969 and 1971; the Dodge survey; and "other notes and witnesses on file in the offices of Emil Beeg, Land Surveyor, Inc. and in the Jasper County Surveyor's Office." Def. Ex. B.

> Prior surveys were accessed from the County Surveyor's records and from the client, Mr. Barbee. Some private records, not attainable from either the County Surveyor or the County Recorder, being surveys of adjacent lands were also reviewed. Deeds from all adjacent property owners were researched for their accuracy in relation to the Barbee property. The existing monuments at the property corners were also contributing factors in determining the true location of the property line in relation to the existing fence line.
>
> Those surveys used for this survey are as follows: [the Dodge Survey]; [the 1994 Beeg Survey]; [the 2005 Beeg Survey], and Arnott surveys for Charles Carter, dated March 5, 1969, and January 18, 1971 (now the Hanaway land[4]).
>
> * * * * *
>
> The fence line in question is entirely on Mr. Stone's property, as per title survey relative to prior surveys. The west end of woven wire fence is 0.72 feet north of the property line, and the east end is 0.75 feet north of the property line. A post in the middle of that line was located and found to be 0.35 feet north of the property line.

Def. Ex. C (emphasis added).

One week later, on March 21, 2005, Barbee had yet another survey ("the Fence Line Exhibit") conducted by Kevin Sayers. The Fence Line Exhibit was based entirely upon the 1994 Beeg Survey, which Barbee supplied. However, on April 19, 2005, Sayers made revisions to the Fence Line Exhibit because he learned about discrepancies "regarding information which was originally received by the client" and because "more information ha[d] been discovered." Pl. Ex. 4. Sayers's report goes on to state:

> [T]he monumentation around [the 1994 Beeg Survey] in some cases varies from record values. However, I also agreed with [Beeg's] findings and have accepted these monuments as the original intent of the earlier surveys. Due to this information, a second exhibit is shown hereon with respect to the calculated north line of the Barbee tract.

[4] The Hanaway land is adjacent to the south of Barbee's land.

Id. Accordingly, Sayers included two diagrams in his Plat of Survey: (1) the "Fenceline Exhibit in Relation to Calculated Line" and (2) the "Original Fenceline Exhibit" (collectively, the "Turning Point Survey"). Pl. Ex. 4. According to the Fenceline Exhibit in Relation to Calculated Line, the fence in dispute lies partially on the Stones' property and partially on the property line. According to the Original Fenceline Exhibit, however, the outer fence posts are on the Stones' property, while sixteen out of seventeen of the interior posts are on Barbee's property.

On April 28, 2005, a bench trial was held, and the parties stipulated to the admission of all of the foregoing surveys. Barbee testified that Charles "in the past admitted it was on me," Tr. at 8, after which Barbee consulted an attorney. Barbee also questioned the markers relied upon by the surveyors. On June 27, 2005, the trial court issued an Order setting forth findings of fact and conclusions of law, including, in relevant part, the following:

FINDINGS OF FACT

* * * * *

> 5. The 1994 Beeg survey clearly depicts the Stone's [sic] fence being entirely to the north of [Barbee's] property as found by that Surveyor and the previous Surveyor, Cary B. Dodge.
>
> * * * * *
>
> 8. All surveys, until the last plat survey, show the Stone's [sic] fence post and fence being north of the true boundary line separating the Barbee and Stone property.
> 9. All surveys except for [the Dodge Survey] reports [sic] discrepancies in the location of the survey markers and the belief that the markers had been moved from their original location.
> 10. Defendants Stone testified that neither of them, nor anyone on their behalf, had ever moved the survey markers from their original positions.

11. Plaintiff Barbee had, in his possession, at all times, copies of the surveys defining the fence line prior to filing this case.
12. [The Turning Point Survey] shows that on a fence line of two hundred eight (208) feet, the fence is approximately seven-hundredths of a foot over the property line of the Plaintiff, Barbee, being the last survey conducted in this matter, just prior to trial.[5]

CONCLUSIONS OF LAW AND JUDGMENT

* * * * *

The Court having reviewed all surveys admitted in this matter finds [the Kingman Survey] to be the most comprehensive.

Further, the Court finds that [the Turning Point Survey] fence line exhibit showing seven hundredths of a foot is a deviation that the Court can accept as a tolerable deviation given the status of the property line boundaries. However, the Court finds that when it looks at all surveys conducted, it should disregard the results of [the Turning Point Survey], and that seven-hundredths of a foot on a fence line of two hundred eight (208) feet that would be accepted as a standard deviation, and therefore disregards that finding based upon all of the other surveys conducted.

Further, the Court finds that at the time of the filing of this action, the Plaintiff knew that all surveys in existence clearly showed that the fence line was appropriately placed on Defendant Stone's property.

Further, the Court finds that the subsequent surveys, with the exception of the final Turning Point survey, had the same results.

Therefore, the Court finds that the filing of this action is frivolous and that the Plaintiff, Barbee, take nothing by way of his Complaint. Further, the Court finds that it will award attorney fees in favor of Defendants Stone and against the Plaintiff, Barbee, in the sum of Two Thousand Dollars ($2,000.00) for the filing of this frivolous action.

Appellant's App. at 6-9. Barbee now appeals.

[5] On appeal, Barbee argues that the trial court ignored the main thrust of his argument because "the deviation as to the length of the property line as seven hundreds of a foot was not even an issue." Appellant's Br. at 5. Barbee claims that the trial court "never made any finding that was specifically addressed to the main theory of [Barbee's] case – the Stones [sic] fence was on his property and the trial court ignored that evidence. There was no finding to refute the Turning Point Survey . . . ." Id. at 6. We disagree. The trial court found that "[a]ll surveys, until the last plat survey, show the Stone's [sic] fence post and fence being north of the true boundary line separating the Barbee and Stone property." Appellant's App. at 7. The trial court made similar findings in its Conclusions of Law and Judgment.

Discussion and Decision

I. Trial Court's Findings and Conclusions

Barbee contends that the judgment for the Stones is contrary to law because the trial court "arbitrarily" relied upon the Kingman Survey. Pursuant to Indiana Trial Rule 52, we will not set aside a trial court's findings or judgment unless clearly erroneous, and due regard shall be given to the trial court's opportunity to judge witness credibility. We use a two-tiered standard of review when applying this standard. Ballard v. Harman, 737 N.E.2d 411, 416 (Ind. Ct. App. 2000), reh'g denied. First, we consider whether the evidence supports the findings, interpreting the findings liberally in support of the judgment. Id. Findings are clearly erroneous only when a review of the record leaves us firmly convinced that a mistake has been made. Id. Second, we determine whether the findings support the judgment. A judgment is clearly erroneous where the findings of fact and conclusions thereon do not support it. Id. "In applying this standard, we neither reweigh the evidence nor judge the credibility of the witnesses. Rather, we consider the evidence that supports the judgment and the reasonable inferences to be drawn therefrom." Id.

In addition, where, as here, the party who had the burden of proof at trial appeals, the party appeals from a negative judgment and will prevail only upon establishing that the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. MCS LaserTec, Inc. v. Kaminski, 829 N.E.2d 29, 34 (Ind. Ct. App. 2005).

The trial court found the Kingman Survey to be the most comprehensive of all

surveys. Barbee relies upon the Turning Point Survey, which was created after discrepancies were noted in the Fenceline Exhibit and more information had been discovered, but the Turning Point Survey does not specify what additional information was discovered and/or relied upon. Regarding the remaining surveys, we observe that the Dodge Survey of the Stone property and the 1994 Beeg Survey of Barbee's property were both limited to plats of those properties; little or no measurements were made regarding adjacent parcels, and there was no indication that other documents were reviewed in conducting either survey. In contrast, the 2005 Beeg Survey was conducted with reference to several prior surveys, plats, and surveyor notes. The Kingman Survey then relied upon the 2005 Beeg Survey and the surveys referenced therein, as well as documents provided by Barbee himself and surveys and deeds from all adjacent lands. Thus, the evidence supports the trial court's finding that the Kingman Survey was the most comprehensive.

The trial court concluded that all surveys except the Turning Point Survey showed the fence was on the Stones' property. We also observe that, according to the 2005 Beeg Survey, some of the fence posts lie on Barbee's property. However, the 1994 Beeg Survey showed that, at the time Barbee filed this action, existing markers for Barbee's parcel were located south of the Stones' fence corners, which suggests that the fence was on the Stones' property. The 2005 Beeg survey showed the outer fence posts on the Stones' property, and the Kingman Survey, which the trial court found to be the most comprehensive, stated that "[t]he fence line in question is entirely on Mr. Stone's property[.]" Def. Ex. C. The trial court went with the weight of the evidence by concluding that the fence was appropriately on the Stones' property. We are not firmly convinced that a mistake has been made.

II. Attorney's Fees

Next, Barbee maintains that the trial court abused its discretion when it awarded $2,000.00 in attorney's fees to the Stones on the basis that Barbee brought a frivolous action. "In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party . . . brought the action or defense on a claim or defense that is frivolous . . . ." Ind. Code § 34-52-1-1. An award of attorney's fees under Indiana Code Section 34-52-1-1 is reviewed through a multi-step process. Stoller v. Totton, 833 N.E.2d 53, 55 (Ind. Ct. App. 2005), trans. denied. First, we review the trial court's findings of fact under the clearly erroneous standard. Id. Second, we review the trial court's legal conclusions de novo. Id. Third, we review the trial court's decision to award attorney's fees and the amount thereof under an abuse of discretion standard. Id.

A claim is "frivolous" under the statute if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for an extension, modification, or reversal of existing law. Gaw v. Gaw, 822 N.E.2d 188, 192 (Ind. Ct. App. 2005). Here, the trial court concluded that Barbee filed a frivolous suit because, at the time, Barbee "knew that all surveys in existence clearly showed that the fence line was appropriately placed on Defendant Stone's property." Appellant's App. at 8. The court made no finding regarding malicious intent, and it relied upon existing law. Thus, we interpret the court's statement as a determination that, because the two surveys in existence showed the fence was on the Stones' property, counsel was unable to make a good faith and rational argument on the merits of the action.

It is true that neither the Dodge survey nor the 1994 Beeg Survey, attached to Barbee's complaint, supported Barbee's position. However, there was a question regarding whether correct markers were used in the 1994 Beeg Survey. Indeed, the court specifically found: "All surveys except for [the Dodge Survey] reports [sic] discrepancies in the location of the survey markers and the belief that the markers had been moved from their original location." Id. at 7. Additionally, it appears that Barbee filed suit, in part, because he wanted to determine the boundaries of his property before he installed his own fence.

Our Supreme Court cautioned that application of the statutory authorization for recovery of attorney's fees "must leave breathing room for zealous advocacy and access to the courts to vindicate rights." Mitchell v. Mitchell, 695 N.E.2d 920, 925 (Ind. 1998) (decided under former codification of statute). The Court continued, "Courts must be sensitive to these considerations and view claim of 'frivolous, unreasonable, or groundless' claims or defenses with suspicion." Id. Additionally, commencing an action will less often be frivolous because investigation through pretrial discovery may be necessary to evaluate the claims. Garza v. Lorch, 705 N.E.2d 468, 473 (Ind. Ct. App. 1998).

In this case, there was a question about the accuracy of the 1994 Beeg Survey. Subsequent surveys both supported and conflicted with Barbee's position. Indeed, the court specifically found that the Turning Point survey showed an encroachment on Barbee's property. Barbee's counsel argued that the trial court should credit that survey and find for Barbee.

Considering all the circumstances in light of guidance by our Supreme Court, we cannot agree that the suit is frivolous. A good faith and rational argument was made to

support Barbee's claim. Thus, we hold that the trial court erred in awarding attorney fees to Stone.

Conclusion

We affirm the trial court's judgment regarding the location of the fence, but we reverse the trial court's award of attorney fees to the Stones.

Affirmed in part and reversed in part.

KIRSCH, C.J., and CRONE, J., concur.